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In the Supreme Court of the United States.

OCTOBER TERM, 1921

THE UNITED STATES OF AMERICA,
ex rel. John W. French,
Plaintiff in Error,
vs.
JOHN W. WEEKS, SECRETARY OF WAR,
Defendant in Error.

No. 724.

THE UNITED STATES OF AMERICA,
ex rel. William F. Creary,
Plaintiff in Error,
vs.
JOHN W. WEEKS, SECRETARY OF WAR,
Defendant in Error.

No. 725.

BRIEF OF PLAINTIFFS IN ERROR.

Statement of the Case.

These cases are here on writs of error to the Court of Appeals of the District of Columbia (pars. 3, 5, and 6, Section 250 Jud. Code) for the review of the judgment of that court reversing the judgment of the Supreme Court of the District of Columbia awarding writs of mandamus against the defendant in error, commanding him to vacate an order purporting to discharge the plaintiff in error Colonel Creary from the Army of the United States and restore him to the office and status of a colonel of infantry, and to vacate an order purporting to retire the plaintiff in error Colonel French from the active serv-

ice of the Army of the United States and to restore him to the office and status of a colonel of infantry.

Colonel Creary and Colonel French were both officers of the Regular Army on the active list in the grade of colonel, with nearly 25 and 23 years of commissioned service respectively, when in November, 1920 the one was discharged from the Army and in December, 1920 the other was retired from active service, as a result of proceedings taken under Section 24b of the National Defense Act of June 4, 1920 (41 Stat. 759), which so far as pertinent here was as follows:

> "Sec. 24b. CLASSIFICATION OF OFFICERS.—Immediately upon the passage of this Act, and in September of 1921and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to Class A, and shall be promoted according to the provisions of this Act to fill any vacancies which may occur prior to such final classification. No officer shall be finally classified in Class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in Class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neg-

lect, misconduct, or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2½ per centum of his active pay multiplied by the number of complete years of commissioned service, or service which under the provision of this act is counted as its equivalent, unless his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay. The maximum retired pay of an officer retired under the provisions of this section prior to January 1, 1924, shall be 75 per centum of active pay, and of one retired on or after that date 60 per centum. If an officer is thus retired before the completion of thirty years' commissioned service, he may be employed on such active duty as the Secretary of War considers him capable of performing until he has completed thirty years' commissioned service."*

Both officers challenged the validity of the action taken on the ground that the proceedings being for the removal of an officer for cause specified by statute, and therefore judicial in character, were null and void because among other reasons (1) the classification and Honest and Faithful proceedings were not approved by the President, and (2) the Honest and Faithful Board gave the officers no notice and no opportunity to be heard. Alleging there-

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*The military Tribunals provided by said section may be helpfully enumerated here:

A. *Upon question of classification:*
   1. Court of Inquiry
   2. Final Classification Board

B. *Whether classification is due to misconduct, neglect, or avoidable habits:*
   1. Board of Officers.

      This Board is commonly known in the Department as the "Honest and Faithful Board," and is so called because military service upon its termination is always characterized as "Honest and Faithful" or "Not Honest and Faithful," the latter being resorted to when the service is found to have been "without honor" or is terminated because of misconduct.

fore that they were deprived of their office by the unlawful action and order of the Secretary of War, these officers filed their petitions for writs of mandamus to compel the Secretary to vacate the said orders and restore the officers. The petitions were filed on January 3, 1921, in the Creary case (Creary R. 1) and on January 21, 1921, in the French case (French R. 1). Answers by Newton D. Baker, then Secretary of War, were filed on January 25, 1921 (Creary R. 7) (French R. 8). Demurrers to the answers were filed January 31, 1921 (Creary R. 7) (French R. 20). On March 10, 1921, by consent of counsel, defendant in error, John W. Weeks, was substituted in place of Newton D. Baker, as party defendant (Creary R. 17) (French R. 21-22).

On March 12, 1921 the Supreme Court of the District of Columbia (McCoy, C. J.) sustained the demurrers to the answers (Creary R. 18) (French R. 22). After considering and overruling certain motions filed on behalf of the defendant in error, the court on April 29, 1921 entered judgments awarding writs of mandamus against the defendant in error commanding him respectively to vacate the order dated the 17th day of November, 1920, purporting to discharge Colonel William F. Creary from the Army of the United States and restore Colonel Creary to the office and status of Colonel of Infantry in the Army as of the 17th day of November, 1920, and to the rights incident and belonging to said office and status of which he was deprived by said order (R. 49-50), and to vacate the order dated the 24th day of December, 1920, purporting to retire Colonel John W. French from active service of the United States Army and to restore Colonel French to the office and status of Colonel of Infantry in the Army of the United States as of the 24th day of December, 1920, and to the rights incident to the office and status of which he was deprived by said order (R. 52).

Facts of Colonel Creary's Case.

Colonel Creary enlisted in the Regular Army of the United States on the 19th day of January, 1893, and served as private, corporal, and sergeant from the date of his enlistment to the 23rd day of March, 1896; that after and as a result of a competitive examination he was duly nominated, confirmed by the Senate, appointed and commissioned from the ranks of the Army, second lieutenant, Infantry, the 5th day of March, 1896; that thereafter in due course of lineal promotion he was, after due examination and a finding of moral, professional, and physical qualification, nominated, confirmed, appointed, and commissioned first lieutenant the 12th day of August, 1898; captain the 9th day of April, 1901; major the 1st day of July, 1916; lieutenant colonel (in the temporarily increased regular establishment) the 5th day of August, 1917; colonel (in the temporarily increased regular establishment) on the same day; and lieutenant colonel in the Regular Army the 27th day of December, 1919; and was duly appointed and commissioned by promotion, colonel in the Regular Army on July 20, 1920, and served in such status until the 23rd day of November, 1920, when he received the following order:

"WAR DEPARTMENT
Washington

Special Orders No. 271-O } November 17, 1920

PEM 423

EXTRACT

CONFIDENTIAL

69. Colonel William F. Creary, Infantry, having been finally classified in Class B, for causes due to his neglect, misconduct, and avoidable habits, his discharge from the

Army, by direction of the President, under the provisions of Section 24b of the Act of Congress approved June 4, 1920, is announced.

By order of the Secretary of War:

PEYTON C. MARCH,
Major-General, Chief of Staff.

Official
P. C. HARRIS,
The Adjutant General

For Official Use Only
Not To Be Made Public."

(Creary R. 1-2)

In June, 1920, plaintiff in error was informed by the War Department that a Classification Board convened by virtue of the authority of said Section 24b had provisionally arranged him in Class B as unfit to be retained in the service. Upon such notification, he requested, by virtue of the authority of said section, a Court of Inquiry, and accordingly a Court was convened by the President at the Headquarters, Sixth Corps Area, Chicago, Illinois, September 21, 1920 to consider and make its recommendation upon—it being without power to decide—the question whether plaintiff in error should be continued in Class B. Plantiff in error appeared before said Court of Inquiry without counsel. The provisional classification board reported it had "examined into the record of Col. William F. Creary, Inf., and upon consideration of his record as a whole from the date of his first commission in the Army of the United States to the present date, finds that he should not be retained in the service." Full copy of the plaintiff in error's record as a whole from the date of his first commission in the Army of the United States to the present date (that is, the date of the proceedings of the provisional classification board) was not furnished him, but instead he was only furnished copies of brief

extracts from his record containing all the unfavorable portions of his record and omitting all favorable portions (Creary R. 3). He was permitted to examine his original record by the Court of Inquiry in its presence only and at its session.

After receiving the copy of the proceedings of the Court of Inquiry, he heard nothing whatever concerning his case until he received the order of discharge of November 17, 1920, hereinbefore referred to (Creary R. 2). He had no notice or knowledge of the convening of the Final Classification Board nor of any proceeding, action, or finding of said board; nor of the convening of the Board of Officers (the "Honest and Faithful Board") to determine whether the classification thus finally made by the Final Classification Board was due to neglect, misconduct, or avoidable habits; nor of any proceeding, action or finding of such Honest and Faithful Board (Creary R. 4). The proceedings of said Boards were had privately and secretly (Creary R. 5). Plaintiff in error had no opportunity to appear before the Final Classification Board to present argument before that board upon the law and the facts; nor had he any opportunity to petition the President for a revision of the action of such board. Nor had he any opportunity to appear before the Honest and Faithful Board, to adduce testimony upon the issue whether the final classification was due to his neglect, misconduct, or avoidable habits, the issue which was before that board for determination, or to present argument upon the law and the facts before that board; nor to petition the President for a revision of the action of that board (Creary R. 5).

The proceedings in his case were never presented to the President; nor did the President ever consider or act upon them. The Secretary of War himself, without conferring with the President about the case, approved the finding

of the Final Classification Board and the Honest and Faithful Board, and discharged the plaintiff in error from the Army, assuming to do so because of the supposed general authority conferred upon him by the President which will hereinafter appear (Creary R. 9). The answer of the defendant in error shows that sometime prior to entering upon the classification of officers pursuant to said Section 24b, the Secretary of War laid before the President the manner of procedure to be followed and the action to be taken in all cases of classification and determination under the provision of Section 24b, and received from the President the general authority and direction that he, as Secretary of War, should in all such cases take such action in the name of the President and by his authority by way of approval, revision, or otherwise as from the circumstances shown by the record in each such case appeared to him, the Secretary of War, to be right and proper; and that pursuant to such general authority and direction the Secretary of War and the Assistant Secretary of War took in this case, as appears by his answer, the following action:

> "1. The signing by this defendant, on behalf and by authority of the President, at the foot of the record of the final classification board, but prior to the submission of such record to the board to determine the cause of plaintiff's classification, of the following notation:
>
> 'Approved,
>
> BAKER,
> *Secretary of War.*'
>
> "2. The signing by this defendant on behalf and by authority of the President, at the foot of the record of the board to determine the cause of plaintiff's classification, of the following notation:
>
> 'Majority report approved,
>
> BAKER,
> *Secretary of War.*'

"3. The reading by this defendant in person of the records of the preliminary classification board, the court of inquiry, the final classification board, and the board to determine the cause of classification, in plaintiff's case, and the signing by W. R. Williams, Assistant Secretary of War, pursuant to instructions to that effect given him by this defendant after such reading, and on behalf of and by authority of the President, on November 17, 1920, subsequent to the action of the board to determine the cause of plaintiff's classification, of an instrument of approval, a copy of which is annexed to this answer and marked Exhibit 1, which is prayed to be taken as a part hereof.

"4. The issuance on November 17, 1920, by order of this defendant on behalf and by authority of the President of a special order discharging plaintiff from the United States Army, of which a true copy, marked Exhibit 2, is attached hereto, and prayed to be taken as a part hereof." (Creary R. 9-10.)

The pleadings also show that the record of the Court of Inquiry was never transmitted to the Judge Advocate General of the Army for his review or revision; and that one member of the provisional classification board had previously made an adverse report on plaintiff in error's efficiency, one member of the final classification board had made a like report, and one member of the board convened to determine the cause of plaintiff in error's classification had sat as a member of a board administratively convened which had classified him as a "misfit."

One Distinguishing Feature of Col. French's Case

The facts in the two cases are parallel except in this: The Honest and Faithful Board decided that the classification was not due to the misconduct, neglect, or avoidable habits of the officer concerned in the case of Colonel French, as a consequence of which he was placed upon the

retired list with honor and retired pay; but that Board held the classification of Colonel Creary was due to his misconduct, neglect, or avoidable habits, and accordingly he was discharged from the Army, completely separated from it, without honor and without pay.

Action by Courts Below.

The Supreme Court sustained the demurrer in the Creary case upon the grounds (1) "that the President's individual action is called for in consideration of the findings of the Final Classification Board" and (2) "that the relator was entitled to notice of the charges against him and to a hearing before the Board of Officers to determine the cause of final classification" (Creary R. 27-30), and in the French case upon the ground that the President's individual action is called for in consideration of the findings of the Final Classification Board (French R. 29).

The Court of Appeals reversed the judgment of the Supreme Court and in its opinion and as ground for its action held: (a) that the duty required of the President by the Act of June 4, 1920 (41 Stat. L. 759-773) to review the action of the Final Classification Board and the Board of Officers and the power conferred upon him by said Act to discharge an officer from the Army of the United States or to place an officer upon the retired list of the Army are administrative and not judicial and can therefore be delegated by him to the Secretary of War; and (b) that the court was without jurisdiction to grant relief since, in the view of the court, the action required of the President being administrative and delegable, the act of the Secretary of War was in effect the act of the President and for that reason was beyond judicial control.

Assignments of Error in Col. Creary's Case.

1. The Court of Appeals of the District of Columbia erred in holding that the Secretary of War had the power

to review and approve the action of the Final Classification Board, the action of the Board of Officers, and to discharge William F. Creary from the Army of the United States.

2. The Court of Appeals erred in holding that the Secretary of War had the power to discharge William F. Creary from the Army of the United States without notice and the opportunity being given him to appear and be heard before the Board of Officers convened to determine the cause of his classification as provided by the Act of June 4, 1920, 41 Stat. L. 759, 773.

3. The Court of Appeals erred in holding that the President had the power to delegate to the Secretary of War the authority to review and approve the action of the Final Classification Board, the action of the Board of Officers, and to discharge William F. Creary from the Army of the United States. (R. 72)

4. The Court of Appeals erred in holding that the duty required of the President by the said Act of June 4, 1920, to review the action of the Final Classification Board and the Board of Officers, and his power to discharge an officer from the Army of the United States under said Act, are administrative and not judicial, and can be delegated.

5. The Court of Appeals erred in holding that the duty required by said Act of June 4, 1920, to review the action of the Final Classification Board and the Board of Officers, and the power given by said act to discharge an officer from the Army, need not be exercised personally by the President. (R. 73)

6. The Court of Appeals erred in holding that it was without jurisdiction to compel the Secretary of War to vacate the order made by the Secretary of War discharging William F. Creary from the Army and to restore him to his office as colonel in the Army of the United States from which he had been discharged. (R. 73)

Assignments of Error in Col. French's Case.

1. The Court of Appeals of the District of Columbia erred in holding that the Secretary of War had the power to review and approve the action of the Final Classification Board, the action of the Board of Officers, and to place John W. French upon the retired list of the Army of the United States.

2. The Court of Appeals erred in holding that the President had the power to delegate to the Secretary of War the authority to review and approve the action of the Final Classification Board, the action of the Board of Officers, and to place John W. French upon the retired list of the Army of the United States.

3. The Court of Appeals erred in holding that the duty required of the President by the Act of June 4, 1920 (41 Stat. 1. 759-773) to review the action of the Final Classification Board, and the Board of Officers, and his power to place an officer upon the retired list of the Army of the United States under said Act, are administrative and not judicial, and can be delegated.

4. The Court of Appeals erred in holding that the duty required by the said Act of June 4, 1920 to review the action of the Final Classification Board and the Board of Officers, and the power given by that Act to place an officer upon the retired list of the Army of the United States need not be exercised personally by the President.

5. The Court of Appeals erred in holding that it was without jurisdiction to compel the Secretary of War to vacate the order made by the Secretary of War placing John W. French upon the retired list of the Army of the United States, and to restore him to his office as colonel upon the active list of the Army of the United States from which he had been retired. (R. 74)

Argument.

I.

THE SECRETARY OF WAR'S "APPROVAL" OF THE FINAL CLASSIFICATION OF THESE OFFICERS AND OF THE HONEST AND FAITHFUL BOARD'S PROCEEDINGS IN THE CASE OF COLONEL CREARY WAS WITHOUT AUTHORITY OF LAW AND NULL AND VOID.

1. *The law requires Presidential review and action.*

(a) It is held throughout and by all that the law requires the President to review the proceedings of the classification board and of the Honest and Faithful Board. The President was of that opinion; but misconceiving, as we think, the judicial character of his duty, he undertook to make a general delegation of it in all cases to the Secretary of War (Creary, 9). The Supreme Court and the Court of Appeals also agreed as to the necessity of Presidential action but differed as to whether it was judicial or administrative in character.

(b) The statute clearly imposes the duty of Presidential review.

It designates a Court of Inquiry and Military Boards to hear and determine the question of classification and the causes therefor, and specifically provides that the President shall be the convening authority. Courts of Inquiry and Military Boards are of such a nature that their proceedings must necessarily be reviewed by the authority convening them (*Winthrop's Military Law and Precedents*, pp. 795–822). The statute makes express reference to the President's power of revision.

The then President seems to have had no doubt that he was the reviewing authority in all cases; and such is the view of the present President, as indicated by the Regulations established by him.

2. *The proceedings themselves are judicial in character, and so, necessarily, must be the Presidential review of them. That review therefore can not be delegated.* (*Runkle* v. *United States*, 122 U. S. 543; *United States* v. *Page*, 137 U. S. 673; *United States* v. *Fletcher*, 148 U. S. 84).

(a) The Presidential review is inherently judicial.

The statute provides for the removal of officers of the Army for causes specified which affect their good name, standing, and honor. If the officer is found inefficient, he can no longer remain on the active list, and if his inefficiency is found to be due to his own misconduct, neglect, or avoidable habits, then he is to be separated from the Army absolutely, discharged "without honor" and without pay. Where such is the case, in accordance with a fundamental principle of our law, the proceedings are judicial. *Runkle* v. *United States*, 122 U. S. 542; *Reagan* v. *United States*, 182 U. S. 419, 425; *Shurtleff* v. *United States*, 189 U. S. 311–314; *Kalbfus* v. *Siddons*, 42 App. D. C. 310, 318, and the many cases cited under Point II.

Reaves v. *Ainsworth*, 219 U. S. 296 and *Street* v. *United States*, 133 U. S. 299, heretofore relied upon by counsel on the other side, support him at no point, but proceed in recognition of the principles of law relied upon by us. The statute which constituted the law of the case in *Reaves* v. *Ainsworth* was one which authorized the President to establish a system of examination for *promotion*, not removal from office for specified cause. *That statute placed the entire power in the hands of the President; he could establish any system he pleased, without restriction.* The system which by regulation he did establish kept the power of final review over the examining boards in his own hands and this fact is emphasized in the opinion of the Court. That statute, for that purpose, gave unlimited power to the President; the present statute does nothing of the kind, but specifies the causes of removal,

and endows boards of a judicial character with power to determine such causes after hearing. These boards must grant the hearing and keep within their jurisdiction.

In the *Street* case, which arose under a statute the primary purpose of which was to reduce the Army (by honorable discharge and by discharge for cause without honor), the Department proceeded first to eliminate an officer *for cause* under Section 11 of the Act. That section expressly required a hearing for such elimination. The Department finding it could not get the witnesses, abandoned the hearing for cause and proceeded under section 12 of the Act which authorized the Department to create a list of *supernumerary* officers (officers who were not needed in the largely reduced Army) and *honorably discharged* such supernumeraries. This was not a removal *for cause*, but a method of muster-out of a large number of officers no longer needed, the war being over. All that the court held in that case was that the authorities had the right, of course, to withdraw the charges of removal for cause and proceed under the honorable muster-out section.

(b) That Congress legislated with that principle in view and contemplated proceedings of a judicial character is indicated also by the judicial character of the agencies designated for the purpose.

A Court of Inquiry, equally with a court-martial, is enumerated in the Articles of War as one of the several military tribunals (Articles 23, 24, 25, 26, 32, 38, 97–102); and a Military Board, statutorily designated, is a military tribunal, or agency, well recognized in the Articles of War, upon which all necessary powers for conducting a hearing are conferred by those Articles (Articles 23, 24, 25, 26, 32, 38).

(c) That Congress intended that every officer subjected to removal proceedings should have a full and fair hearing is clearly shown by the legislative history of said section.

The Committee Reports (No. 400, 66th Cong. 2nd Sess.), the statements of Committee spokesmen in debate (Cong. Rec., Vol. 59, No. 80, pp. 4626, 4629; Id. No. 82, pp. 4712–4724), as well as the testimony of the distinguished officers at the Committee hearings—all are to the effect that an officer should be heard fully by the Classification agencies and by the Honest and Faithful Board. The Committees in their reports and Committee spokesmen in debate said time and again that officers subjected to these proceedings "will have the general rights of an officer being tried by court-martial;" "will get a square deal;" that "in adopting this section of the bill," the Committee "denied it had any idea of setting up any star-chamber proceedings whatever." Mr. Greene, of Vermont, in charge of the bill in the House, said for the Committee:

> "I want to be understood that I myself and the Committee are sympathetic with the idea of giving these men all the chance they can have, and if there can be framed words to clarify this section, if it needs any clarification, that is what we desire. If the Committee has used language which does not seem to go to the extent that the temper of the House has unanimously indicated it should go, for my part I desire that the language should be made clear. That is the Committee's purpose." (Cong. Rec., Vol. 59, No. 80, p. 4630.)

II.

THE PROCEEDINGS OF THE HONEST AND FAITHFUL BOARD, HAD WITHOUT GIVING TO COLONEL CREARY NOTICE AND OPPORTUNITY TO BE HEARD, ARE NULL AND VOID.

The Board found that the classification of this officer was due to his misconduct, neglect, and avoidable habits. In the determination of such an issue due process requires specific charges, due notice of the same, an opportunity to

be heard and make answer, cross-examine the witnesses, and argue the law and facts. *Reagan* v. *United States*, 182 U. S. 419; *Shurtleff* v. *United States*, 189 U. S. 311; *Kalbfus* v. *Siddons*, 42 App. D. C. 310. In the footnote* we cite many state cases for this proposition, and we find none denying the principle.

III.

THE ORDER FOR COLONEL FRENCH'S RETIREMENT (FOR THE REASON STATED IN POINT I) AND THE ORDER FOR COLONEL CREARY'S DISCHARGE (FOR THE REASONS STATED IN POINTS I AND II) WERE WITHOUT AUTHORITY OF LAW, AND NULL AND VOID.

If, as we contend, the Classification of Colonels French and Creary required the approval of the President himself acting judicially, then the "approval" of the Secretary of War in both cases was null and void, and all subsequent proceedings predicated upon the validity of the classification were likewise null and void. And if, additionally in the case of Colonel Creary, the proceedings before the Honest and Faithful Board were null and void by reason of the denial to him of the required hearing, or if the proceedings of that Board required the judicial approval of the President, then for those reasons also the order for Colonel Creary's discharge was null and void.

The validity of the orders for retirement and discharge depends upon the validity of the proceedings had under

*In removal proceedings for cause an officer must be given a hearing: *Ekern* v. *McGovern, et al.*, 46 L. R. A., N. S. 797; *Dullam* v. *Willson*, 53 Mich. 392; *Page* v. *Hardin*, 8 B. Mon. 648; *Shumann* v. *McCartney*, 34 App. Div. 19, 53 N. Y. Supp. 1047; *Kasschan* v. *Police Comm.* 155 N. Y. 40; *State ex rel. Gill* v. *Watertown*, 9 Wis. 254; *Randall* v. *State*, 16 Wis. 340; *Larkin* v. *Noonan*, 19 Wis. 82; *Benson* v. *The People*, 10 Colo. App. 179; *Ham* v. *Board of Police of Boston*, 142 Mass. 90; *Metevier* v. *City of St. Louis*, et al., 90 Mo. 19 *Peck* v. *Commissioner of Brooklyn*, 106 N. Y. 65; *Attorney General* v. *Hogan*, 64 Ohio State 532; *Biggs* v. *McBride*, 17 Ore. 640; *Field* v. *Commonwealth*, 32 Pa. St. 478; *Com.* v. *Slifer*, 25 Pa. 34; *Hallgren* v. *Campbell*, 82 Mich. 255.

said section 24b, for it was by virtue of the authority of that section that the orders were issued. The suggestion made in argument in the Supreme Court of the District that the orders in both cases might be sustained under the 118th Article of War was properly met by the Chief Justice when he said:

> "That the relator might have been discharged under the 118th Article of War is not to the point. He was not discharged under that authority." (Creary 30.)

IV.

THE COURT BELOW HELD, INCONSISTENTLY, THAT ALTHOUGH COLONEL CREARY WAS ENTITLED TO A HEARING BEFORE THE HONEST AND FAITHFUL BOARD, WHICH IS TO THE EFFECT THAT THE PROCEEDINGS OF THAT BOARD WERE JUDICIAL IN CHARACTER, THE DUTY OF REVIEW IMPOSED UPON THE PRESIDENT WAS NEVERTHELESS ADMINISTRATIVE AND DELEGABLE TO THE SECRETARY OF WAR.

Such is the opinion of the court below as we understand it. The inconsistency pointed out demonstrates the fallacy of the decision of that court. We respectfully ask this court to test the reasoning of the Court of Appeals by that of the Supreme Court of the District (Chief Justice McCoy) as found in the two opinions in the record.

V.

THE SECRETARY OF WAR, HAVING UNLAWFULLY DISPOSSESSED THESE OFFICERS OF THEIR OFFICES, MANDAMUS IS THE PROPER REMEDY.

The Court of Appeals held not that mandamus was not the proper remedy if the Secretary of War himself had unlawfully dispossessed plaintiffs in error of their offices, but that in these cases the action of the Secretary of War was the action of the President, who had delegated

to the Secretary his authority to act; that therefore the writ was in legal effect directed against the President, who can not be reached by judicial process.

But that reasoning depends upon whether there was a valid delegation to the Secretary of War; if there was not, then the Secretary of War acted without authority and the writ properly lies to him.

Besides, if the proceedings of the Honest and Faithful Board were null and void, then, regardless of the necessity for presidential action and of what that action was, the Secretary of War can find no justification in any attempt of delegation to him. If the proceedings of that Board were null and void, there can be no justification for acting upon them. *Interstate Com. Com.* v. *L. & N. R. R.*, 227 U. S. 88.

In *Kalbfus* v. *Siddons*, 42 App. D. C. 310, the Court, in considering this question, said:

> "Since their order of removal was passed without notice and hearing, it necessarily follows that their action constituted an arbitrary exercise of power, and was void. The question, therefore, is presented whether mandamus is the appropriate remedy. The authorities are overwhelming that it is. 'A mandamus to restore,' says Lord Mansfield, 'is the true specific remedy where a person is wrongfully dispossessed of any office or function which draws after it temporal rights, in all cases where the established course of law has not provided a specific remedy by another form of proceeding.' *Rex* v. *Blooer*, 2 Burr. 1045. In *Harwood* v. *Marshall*, 9 Md. 83, an opposite case, it was ruled that mandamus was the appropriate remedy, because a judgment under quo warranto might remove the incumbent, but would not install the claimant in the office from which he had been illegally removed."

See, also, *Garfield* v. *Spalding*, 32 App. D. C. 153; *Ex rel. Moyer* v. *Baldwin*, 77 Ohio St. 532; *Chicago* v.

People, 210 Ill. 84; *Metzker* v. *Neally*, 41 Kans. 122; *Pratt* v. *Police and Fire Commissioner*, 15 Utah 1; *Miles* v. *Stevenson*, 80 Md. 358; *Field* v. *Malster*, 88 Md. 691; *People ex rel. Percival* v. *Cram*, 50 App. Div. 380 (N. Y.); *Sugden*, 174 N. Y. 87; *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249. In the latter case the Court, speaking by Mr. Justice Day, said:

> "But, as has been affirmed by this court in former decisions, *there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.*"

Conclusion.

The statute under discussion prescribes the machinery, the methods, and the procedure for removing an officer from the service for cause, and requires, for the protection of the public as well as of the officer, a hearing of the officer and reviewing of the removal proceedings by the President. The Army is to be governed by law—by the law of Congress representing the people—and not by the autocratic will of a President, Secretary of War, or military authorities. The removal proceedings in these cases were in violation of the law.

We respectfully submit that the judgment of the Court of Appeals should be reversed with directions to that court to enter judgment affirming the judgment of the Supreme Court of the District of Columbia.

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